DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 04-0444
Gross Retail Tax
For 2001 through 2003

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ISSUE

I. **Purchase of Golf Simulators** – Gross Retail Tax.

Authority: IC 6-2.5-1-21(a); IC 6-2.5-1-21(d); IC 6-2.5-2-1; IC 6-2.5-4-10; IC 6-2.5-5-8; IC 6-2.5-5-1 to 70; Black's Law Dictionary (7th ed. 1999).

Taxpayer challenges the Department of Revenue's decision to assess use tax on the purchase price of three golf simulators.

STATEMENT OF FACTS

Taxpayer owns and operates golf courses. Taxpayer earns money from the provision of services and the sale of items associated with the operation of the golf courses.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit concluded that taxpayer should have paid sales tax when it purchased three golf simulators. Because taxpayer did not pay sales tax, the Department assessed use tax.

Taxpayer disagreed, submitted a protest to that effect, an administrative hearing was conducted during which taxpayer's representative explained the basis for the protest, and this Letter of Findings results.

DISCUSSION

I. **Purchase of Golf Simulators** – Gross Retail Tax.

Taxpayer bought three golf simulators during 2002. The golf simulators were described in the audit report as "high tech driving range[s]."

Thereafter, taxpayer began to make the simulators available to its customers charging the customers an hourly rate for the privilege.

Because taxpayer did not pay sales tax after initially purchasing the simulators, the audit review assessed use tax. The audit did so on the ground that, "the golfer has no element of control when using the simulators, therefore the taxpayer is providing a service and the simulators are subject to use tax." Taxpayer disagreed with this determination arguing that its customers were renting the

simulators. On the ground that the simulators were intended for rental purposes, taxpayer claimed the initial purchase was not subject to sales tax and that the audit's assessment of use tax was inappropriate. Based on this argument, taxpayer admits that it should have been collecting sales tax on the rental fees received each time it rented one of the simulators. Taxpayer admits that it failed to do so but concedes that sales tax on the rental fees is now due.

Indiana imposes a gross retail (sales) tax on retail transactions made in Indiana. IC 6-2.5-2-1. The legislature has provided a number of exemptions to the imposition of that tax. *See* IC 6-2.5-5-1 to 70. One of those exemptions is provided at IC 6-2.5-5-8. IC 6-2.5-5-8 provides, "Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property."

Under taxpayer's interpretation of the facts, it bought the three golf simulators because it wanted to rent the simulators to its customers. Because the simulators were bought for the purpose of "rental, or leasing in the ordinary course of [its] business," the purchase of the simulators was not subject to sales tax.

Under the audit's interpretation, taxpayer bought the simulators because taxpayer wanted to provide a service to and earn money from its customers. The audit disagrees with taxpayer's position because the customers do not exercise control over the simulators; the customers do not "rent" the simulators, they simply receive a service, enjoy the use of the simulators, and pay taxpayer for the privilege of doing so.

Taxpayer quotes from IC 6-2.5-1-21(a) which states in part: "'Lease' or 'rental' means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend." However, it should be noted that IC 6-2.5-1-21(d) states that, "This section applies only to leases or rentals entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003."

Assuming for the moment that that IC 6-2.5-1-21(a) applies to the specific transactions at issue, taxpayer points out that taxpayer's simulator customers exercise control over the simulators. Taxpayer states that the customers have exclusive use of the simulators for a defined period; the customers have the ability to determine the speed of the game; the customers have the right "to determine what type of entertainment to enjoy;" the customers have the right to determine who is allowed in the simulator; and the simulators are controlled by the customers from within the simulator booth.

The Department is unable to agree that taxpayer transfers "possession" of the simulators to its customers. "Possession" means, "The fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary 1183 (7th ed. 1999). "Possession . . . is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title." Id. The simulator customers do not take "possession" of the simulators, they merely have the right to use the simulators for a fixed period of time. In that sense, the simulators are analogous to the electronic games found in video arcades. The video game customer pays for the privilege of using the game without interference from other customers and controls the manner in which the game is played. The video game customer may have the exclusive right to use the video game for a short period, but the video game customer does not take

"possession" of the device. Both taxpayer and the arcade owner would look askance at any customer who backed up a truck and attempted to take possession of either the simulator or the video game.

In contrast, a person who rents or leases a car is entitled to take possession of the car and to continue to exercise that possessory interest for a fixed period of time. The person who visits a local rental store and arranges to rent a lawn mower over the weekend, takes "possession" of the lawn mower for the weekend. The automobile rental business and the local rental store purchase the car and the lawn mower without paying sales tax pursuant to IC 6-2.5-5-8 but must thereafter collect sales tax from their customers each time the car or lawn mower is rented. (*See* IC 6-2.5-4-10).

Taxpayer is in the business of providing a service to its simulator customers; that service consists of permitting its customers to use – not truly possess – the golf simulators for a fixed period of time. Although the transitory "use" of the simulators possesses qualities which mimic the attributes of "possession," nevertheless, the simulator customers do not acquire uninhibited possession of the simulators. Because taxpayer provides a service to its customers, taxpayer should have paid sales tax at the time it bought the simulators.

FINDING

Taxpayer's protest is respectfully denied.

DK/TG/JM – 060601